

STATE OF MICHIGAN
COURT OF APPEALS

BEYENECH TSEGAYE,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

April 20, 2004

No. 245249

Ingham Circuit Court

LC No. 01-093663-NO

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff appeals of right the trial court’s order granting summary disposition to defendant under MCR 2.116(C)(10). Plaintiff claims the court erred in dismissing her claim of racial discrimination and retaliation under Michigan’s Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm. We review de novo a trial court’s grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff claims defendant violated her civil rights under MCL 37.2202(1)(a). An individual may bring a claim under this section of the CRA either by presenting direct evidence of disparate treatment or by putting forward sufficient indirect evidence to create an inference of discrimination that the defendant must, in turn, rebut. *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347, 359-360; 597 NW2d 250 (1999). Cases using these two methods of proof are referred to as “mixed motive” and “pretextual” cases, respectively. *Id.*

In the instant case, plaintiff attempts to establish discrimination under both the mixed motive and pretextual theories. To establish a prima facie case of pretextual discrimination, plaintiff must show (1) membership in a protected class, (2) an adverse employment action, (3) qualification for the position, and (4) circumstances of the adverse action that give rise to an inference of unlawful discrimination. *Id.* at 361. In the instant case, the only element at issue is whether plaintiff was treated differently from white male psychologists for the same or similar conduct.

An inference of discrimination may be drawn “when the plaintiff ‘was treated differently than persons of a different class for the same or similar conduct.’” *Id.*, quoting *Reisman v Wayne State University Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). The disparate treatment is irrelevant though unless plaintiff shows that all relevant aspects of plaintiff’s and the other psychologists’ employment were virtually identical. *Town v Michigan Bell Telephone Co*,

455 Mich 688, 700; 568 NW2d 64 (1997) (Brickley, J.). To be similarly situated, the other psychologists generally must “have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992).

First, plaintiff claims disparate treatment with respect to the discipline she received for refusing to see a suicidal prisoner on January 27, 1999. Plaintiff claims that a white male psychologist also refused to see a prisoner but was not disciplined. Even if we were willing to find disparate treatment based solely on plaintiff’s affidavit, the evidence suggests that the circumstances in that case were entirely different. The white psychologist was asked to see the prisoner by *another psychologist*. There is no evidence that the prisoner was the primary responsibility of the white psychologist. In the instant case, the suicidal prisoner was the primary responsibility of plaintiff. Therefore, this incident does not support plaintiff’s disparate treatment claim.

Next, plaintiff claims she was unfairly disciplined for failing to legibly sign in and out of the prison because many other psychologists also wrote illegibly on the sign-in and sign-out sheets. However, plaintiff mischaracterizes the violation for which she was disciplined. Plaintiff was not disciplined for failing to write legibly; she was disciplined for using checkmarks instead of recording the actual time of her arrival and departure. No other employee used checkmarks. Plaintiff also admits that she is the only employee who has ever received a counseling memorandum for her misuse of the sign-in and sign-out procedure, which further distinguishes her from other employees. Therefore, we find no disparate treatment on this ground.

Next, plaintiff claims she suffered disparate treatment when she was suspended for failing to respond immediately to emergency suicide referrals on March 7, 1999. Plaintiff claims a white male psychologist also responded in an untimely fashion to an emergency weekend referral but was not disciplined. However, plaintiff ultimately suffered no adverse employment action as a result of her untimely response because the arbitrator set aside her suspension for this violation. An adverse employment action that is subsequently remedied through a grievance procedure is not considered adverse action for purposes of a discrimination claim. *Dobbs-Weinstein v Vanderbilt University*, 185 F3d 542, 545-546 (CA 6, 1999).

Even if this Court presumes that plaintiff provided sufficient facts to create a rebuttable presumption of discrimination, defendant presented sufficient facts to rebut the presumption of discrimination when it demonstrated that it only suspended plaintiff for her verified violations of work rules. *Harrison v Olde Finacial*, 225 Mich App 601, 608-609; 572 NW2d 679 (1997). Plaintiff offers no evidence or argument demonstrating that defendant’s explanation was merely a pretext for taking discriminatory action. Therefore, plaintiff’s “pretextual” claim of discrimination fails. *Id.*

Next, plaintiff attempts to establish a mixed-motive case of discrimination. Under this theory, plaintiff must present direct evidence that, if believed, would *require* the conclusion that the alleged discrimination was at least a substantial or motivating factor in the adverse employment action. *Id.* at 610-611. We agree with the trial court that mere statements by others of a belief that they were treated in a discriminatory fashion does not constitute direct evidence *requiring* the conclusion that a discriminatory motive was a substantial factor in *defendant’s*

adverse employment action. But even presuming such statements are adequate evidence, defendant would still prevail on its motion for summary disposition by showing that defendant would have suspended plaintiff anyway, regardless of any discriminatory motive. *Id.* at 611. In this case, we concur with the impartial arbitrator who reviewed and upheld several of the alleged rule violations and found that they warranted a fifteen-day suspension. Given the justification for plaintiff's suspension, we find that she would have been suspended anyway, even without consideration of any discriminatory factors. Having failed to prove disparate treatment under either a pretextual or mixed-motive theory, plaintiff's claim of discrimination under MCL 37.2202(1)(a) must fail.

Next, plaintiff claims unlawful retaliation under MCL 37.2701(a). To prevail on a claim of retaliation under the CRA, the plaintiff must establish a causal relationship between adverse employment action and a protected activity. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Plaintiff's claim that she was "set up" for investigation and suspension by the deputy warden is far too speculative, and the connection to her protected activities far too attenuated, to support a claim of retaliation under the CRA. Furthermore, plaintiff's claim that her second-line supervisor retaliated against her by citing her for inhumane treatment must fail because the arbitrator ultimately decided not to take any disciplinary action based on the accusation. *Dobbs-Weinstein, supra* at 545.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray